Supreme Court, U.S.
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In The Supreme Court of the United States

FRANK CHAVES,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

Petition for Writ of Certiorari

Charles G. White
Counsel of Record
LAW OFFICE OF
CHARLES G. WHITE, P.A.
2250 S. W. Third Avenue
Suite 150
Miami, Florida 33129
(305) 856-1211

Counsel for Petitioner

THE LEX GROUP ♦ 1205 East Main Street ♦ Suite 2 East ♦ Richmond, VA 23219
(804) 644-4419 ♦ (800) 856-4419 ♦ Fax: (804) 644-3256

QUESTIONS PRESENTED

I. WHETHER MERELY REDACTING REFERENCES TO THE INITIAL ILLEGAL ENTRY FROM AN AFFIDAVIT FOR A SEARCH WARRANT SATISFIES THE REQUIREMENT THAT ANY TAINT FROM THAT ILLEGALITY BE SATISFIED BY PROOF THAT THE SEARCH WARRANT WAS DERIVED FROM AN INDEPENDENT SOURCE.

II. WHETHER THE PETITIONER WAS ARRESTED WITHOUT PROBABLE CAUSE, AND THE ITEMS TAKEN FROM HIS PERSON AS WELL AS EVIDENCE IN A VAN WERE SUPPRESSIBLE AS THE FRUITS OF THAT ILLEGAL ARREST.

TABLE OF CONTENTS

QUESTIONS PRESENTED i

TABLE OF CONTENTS ii

TABLE OF AUTHORITIES iii

OPINION BELOW 1

BASIS OF JURISDICTION 1

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED 2

STATEMENT OF THE CASE 2

REASONS FOR GRANTING THE WRIT 6

CONCLUSION 11

APPENDIX ..... App. i

TABLE OF AUTHORITIES

CASES

Adams v. Williams,
407 U.S. 143, 92 S.Ct. 1921,
32 L.Ed.2d 612 (1972) 9

Alabama v White,
496 U.S. 325, 110 S.Ct. 2412,
110 L.Ed.2d.2d 301 (1990) 9

Beck v. Ohio,
79 U.S. 89, 85 S.Ct. 222,
13 L.Ed.2d 142 (1964) 10-11

Brown v. Illinois,
422 U.S. 590, 95 S.Ct. 2254,
45 L.Ed.2d 416 (1975) 11

Davis v. Mississippi,
394 U.S. 721, 89 S.Ct. 1394,
22 L.Ed.2d 676 (1969) 11

Dunaway v. New York,
442 U.S. 200, 99 S.Ct. 2248,
60 L.Ed.2d 824 (1979) 11

Franks v. Delaware,
438 U.S. 154, 98 S.Ct. 2E74,
57 L.Ed.2d 667 (1978) 9

Illinois v. Gates,
462 U.S. 213, 103 S.Ct. 2317,
76 L.Ed.2d 527 (1983) 6, 9

Murray v. United States,
487 U.S. 533, 108 S.Ct. 2529,
101 L.Ed.2d 472 (1988) 5, 7, 8

Nix v. Williams,
467 U.S. 431, 104 S.Ct. 2501,
81 L.Ed.2d 377 (1984) 8

Ornelas v. United States,
517 U.S. 690, 116 S.Ct. 1657,
134 L.Ed.2d 911 (1996) 10

United States v. Brundidge,
170 F.3d 1350 (11th Cir. 1999) 9-10

United States v. Chaves,
169 F.3d 687 (11th Cir. 1999) 1, 5

United States v. Glinton,
154 F.2d 1245 (11th Cir. 1998) 5

Wong Sun v. United States,
371 U.S. 471, 83 S.Ct. 407,
9 L.Ed.2d 441 (1963) 7

STATUTES:

Title 28, United States Code, Section 1254(1) 1

CONSTITUTION:

Amendment XIV 1

FRANK CHAVES respectfully petitions the Supreme Court for the United States for a Writ of Certiorari to review the opinion and judgment of the United States Court of Appeals for the Eleventh Circuit entered and rendered in Case No. 97-5864 of that Court on March 9, 1999, which affirmed the judgment of the United States Court for the Southern District of Florida.

OPINION BELOW

The Opinion of the Court of Appeals is reproduced in the Appendix filed herewith (App.) at App. 1, and is reported as United States v. Chaves, 169 F.3d 687 (11th Cir. 1999).

BASIS OF JURISDICTION

The judgment sought to be reviewed is the decision of the United States Court of Appeals for the Eleventh Circuit which is published in the Federal Reporter as United States v. Chaves, 169 F.3d 687 (11th Cir. 1999). The decision was entered on March 9, 1999, and rehearing was denied on June 29, 1999. The Orders denying Rehearing, and Rehearing En Banc are filed herewith at App. 11 and 12 respectively.

A timely filed application for extension of time within which to file a Petition for Writ of Certiorari was granted to November 5, 1999. Jurisdiction is invoked under Title 28, United States Code, Section 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The United States Constitution, Amendment XIV, provides:

> The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

STATEMENT OF THE CASE

On December 12, 1996, DEA agents developed a plan to utilize an informant to acquire 240 kilograms of cocaine.

The informant, who was never identified or produced, was to drive his vehicle to a shopping mall, enter it, and meet an unknown individual inside. At the meeting, he would give the individual the keys to his vehicle, and make arrangements to pick it up later. Neither the informant nor any of the agents knew who the informant was going to meet or what, if any, further instructions or directions would be given

The agents dispatched to watch the transfer were not successful in seeing the informant meet with anyone after entered the shopping mall. Within a few minutes, an individual later identified as FRANK CHAVES was seen leaving the mall and proceeding to the informant's van. When the informant reported to the agents afterwards, he stated that CHAVES was not the person he met in the shopping mall and gave the keys. A moving surveillance, assisted by a police helicopter, followed the van as it drove

from the shopping mall to a warehouse area. It remained behind the closed bay door of a warehouse for about ten minutes. When the van left the warehouse, some of the agents continued to follow it, while others remained behind at the warehouse.

Eventually, the surveillance observed the van pull into a parking space at a Miami Subs Restaurant.

A videotape of the aerial surveillance of the van was shown to the jury and reflected that CHAVES, while driving the van, never engaged in any suspicious activity. Once the van had parked in front of the Miami Subs Restaurant, CHAVES exited the vehicle and entered the restaurant. At this point, a decision was made to arrest CHAVES. The agents entered the Miami Subs and summoned CHAVES, who had just ordered some food and a beer. CHAVES exited the restaurant where he was placed under arrest.

A search incident to CHAVES' arrest revealed keys to the warehouse and the van, a cellular telephone, a digital pager, and miscellaneous business cards and documents. A search of the van yielded ten cardboard boxes which contained approximately 240 kilograms of cocaine. No effort was made to obtain a warrant to search the van. The agents waited approximately 20 minutes after CHAVES' arrest to search it.

Meanwhile, the agents remaining in the warehouse observed Rafael Garcia and John Torres exit. They were placed under arrest.

CHAVES was taken to the warehouse area. After approximately 45-60 minutes, the agents broke into the warehouse without either consent or a warrant. No effort had been made to obtain a warrant before the entry. Once inside the warehouse, the agents observed sealed cardboard boxes similar to the ones seized from the van driven by CHAVES.

Only after the cardboard boxes were observed was an application made for a search warrant. The affidavit prepared in support of the search warrant was executed by

Special Agent John Arvanitis of the DEA. It can be found at App. 14.

The affidavit reflected the absence of any information suggesting that there was any additional cocaine in the warehouse other than what was seized from the van except for the similar boxes observed during the alleged protective sweep. The affidavit clearly incorporated the observations of the agents who conducted the protective sweep and noted the similarities between the boxes. The search revealed cocaine in the boxes.

CHAVES, Garcia and Torres were subsequently indicted and charged with narcotics violations. Motions to Suppress were filed by all defendants, and heard by the District Court.[1] After the hearing, the District Court denied CHAVES' efforts to suppress the cocaine found in the van, and denied him standing to contest the cocaine and other evidence seized from the warehouse. The District Court further found that the protective sweep of the warehouse was reasonable. Based upon these findings, the District Court never reached the issue of whether the search warrant in this case qualified as an "independent source".

The U.S. Court of Appeals for the Eleventh Circuit affirmed the denial of the suppression of the cocaine found in the van. It granted CHAVES standing to contest the search of the warehouse. The alleged protective sweep was declared illegal. Having reached that conclusion, the Court redacted the specific reference to the observations of the

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[1] A Magistrate Judge heard the testimony of Agent Arvanitis, and then recessed the case. The District Court, over CHAVES' objections, heard the rest of the witnesses. The District Court relied upon a finding by the Magistrate Judge that Agent Arvanitis was a credible witness, and reviewed the transcript of his testimony. Rafael Garcia has filed a Petition for Writ of Certiorari which is currently pending before this Court which challenges this procedure as a violation of the Federal Magistrate's Act. CHAVES would move to adopt Garcia's argument on that point.

agents conducting the protective sweep from the affidavit and determined that it still contained sufficient probable cause to justify its issuance. United States v. Chaves, 169 F.3d at 690-2.

The Eleventh Circuit believed that its precedents compelled a redaction of the affidavit in order to determine if probable cause still existed without reference to the illegal entry. United States v. Chaves, 169 F.3d at 692, citing United States v. Glinton, 154 F.2d 1245, 1254-55 (11th Cir. 1998). The Court then declared "if so, suppression is not required because 'the exclusionary rule has no application where the government learned of the evidence from an independent source'", id., at 1255, provided, of course, that "the agents' decision to seek the warrant was [not] prompted by what they had seen during the initial entry ". Id. It is this remedy chosen by the Eleventh Circuit that CHAVES disputes. It was not based upon any findings made by the District Court. Merely redacting reference to the illegal entry from the affidavit is not authorized by this Court in Murray v. United States, 487 U.S. 533, 108 S.Ct. 2529, 101 L.Ed.2d 472 (1988), as the remedy when that illegal entry is exploited by the investigating agents.

REASONS FOR GRANTING THE WRIT

ISSUE I

THAT MERELY REDACTING REFERENCES TO THE INITIAL ILLEGAL ENTRY FROM AN AFFIDAVIT FOR A SEARCH WARRANT DOES NOT SATISFY THE REQUIREMENT THAT ANY TAINT FROM THAT ILLEGALITY BE SATISFIED BY PROOF THAT THE SEARCH WARRANT WAS DERIVED FROM AN INDEPENDENT SOURCE.

It is axiomatic that an application for a search warrant must indicate "a fair probability that contraband or evidence of a crime will be found in a particular place." Illinois v. Gates, 462 U.S. 213, 103 S.Ct. 2317, 76 L.Ed.2d 527 (1983). The affidavit contained no allegations establishing the presence of any additional cocaine in the warehouse other than the amount seized from the van. On the contrary, the affidavit recited that the plan was to obtain 240 kilograms of cocaine. Once that cocaine was seized, additional facts were needed to justify an inference that there was any cocaine remaining in the warehouse. Those additional facts were learned from the illegal entry.

After the Defendants were arrested, the agents made no effort to obtain a search warrant, but devoted themselves to deciding how they were going to enter the warehouse. They tried keys taken from Garcia without success. After waiting from between 45 minutes and one hour, they finally decided to break the lock and enter the warehouse. Their justification for this illegal entry was to see if there were any other persons remaining inside the warehouse. They took this action despite being told by Garcia and Torres that there was nobody else inside, there was no danger to any other persons based upon what any individual in the warehouse could do,

and the agents were blocking the only exit from the warehouse. If they had believed that there was additional cocaine, the agents could have waited to apply for a search warrant before they entered the warehouse, assuming they could have convinced a magistrate there was more cocaine inside. Logic suggests that if no boxes had been observed by the agents during their protective sweep, no search warrant would have been sought. Having seen that there was evidence to be seized, Agent Avanitis was motivated to apply for a search warrant. In order to assure the judge to whom the application was presented that there remained suspected contraband in the warehouse, the observations of the agents were included in the affidavit. The search warrant was "fruit of the poisonous tree". Wong Sun v. United States, 371 U.S. 471, 83 S.Ct. 407, 9 L.Ed.2d 441 (1963) . In Wong Sun, this Court stated:

> We need not hold that all evidence is 'fruit of the poisonous tree' simply because it would not have come to light but for the illegal actions of the police. Rather, the more apt question in such a case is 'whether, granting establishment of the primary illegality, the evidence to which the instant objection is made has come at by exploitation of that illegality or is said by means sufficiently distinguishable to be purged of the primary taint

371 U.S. at 487-8, 83 S.Ct. at 417.

In the instant case, the agents exploited the illegality in their decision to seek a search warrant as well as presenting the observations of the agents to the Judge in support of his probable cause determination.

In Murray v. United States, 487 U.S. 533, 108 S.Ct. 2529, 101 L.Ed.2d 472 (1988), this Court held that evidence viewed in a prior illegal entry would not necessarily

invalidate a subsequent search warrant if the facts used to support the search warrant's issuance were independent of that illegal entry. Id., at 535, 108 S.Ct. at 2532. This Court held that "the interest of society in deterring unlawful police conduct and the public interest in having juries receive all probative evidence of a crime are properly balanced by putting the police in the same, not a worse position, than they would have been in if no police error or misconduct had occurred." Id. at 537, 108 S.Ct at 2533, quoting Nix v. Williams, 467 U.S. 431, 433, 104 S.Ct. 2501, 2509, 81 L.Ed.2d 377 (1984). Having conceptually developed the rationale for the "independent source" rule, this Court described how it applied as follows:

> The ultimate question, therefore, is whether the search pursuant to a warrant was in fact a genuinely independent source of the information and tangible evidence at issue here. This would not have been the case if the agents' decision to seek the warrant was prompted by what they had seen during their initial entry, or if information obtained during that entry was presented to the magistrate and affected his decision to issue the warrant.

487 U.S. at 542, 108 S.Ct. at 2536.

In the instant case, the observations of the agents during their illegal entry both prompted the application for a search warrant and was used in the affidavit to influence the judge to issue it.

The facts in Murray were similar to those in the case at bar. The agents were also engaged in a surveillance at a warehouse, and had intercepted some trucks containing marijuana leaving it. The agents went to the warehouse, entered it, and discovered more marijuana. They left the warehouse and applied for a search warrant, did not mention the prior entry, and did not rely on any observations made

during that entry. 487 U.S. at 535-6, 108 S.Ct. at 2532. The independent source rule applied in that case because there was no exploitation of the initial illegal entry. In the instant case, that illegal entry was exploited by the agents, and the subsequent search warrant did not derive from a wholly independent source

The Eleventh Circuit chose to provide CHAVES with the remedy of redacting those references to the illegal entry from the affidavit, and concluding that there still existed probable cause. This redaction remedy has been held to apply in cases where intentionally false statements were found in the affidavit. Franks v. Delaware, 438 U.S. 154, 98 S.Ct. 2E74, 57 L.Ed.2d 667 (1978). Under Franks, a determination that the redacted affidavit still contains probable cause would validate the search warrant.

The Franks redaction remedy is not a valid one to utilize when determining the application of the "independent source" rule. The requirements in Murray demand more than that. In the instant case, the exploitation of the illegally seized evidence occurred both as a motivation for the agents to obtain the search warrant, and to persuade the judge that there was contraband remaining in the warehouse after the seizure from the van.

When considering information received from an informant, a reviewing court must look to the totality of the circumstances in determining whether probable cause has been established. Illinois v. Gates, 462 U.S. 213, 103 S.Ct. 2317, 76 L.Ed.2d 527 (1983); Alabama v White, 496 U.S. 325, 110 S.Ct. 2412, 110 L.Ed.2d.2d 301 (1990); Adams v. Williams, 407 U.S. 143, 92 S.Ct. 1921, 32 L.Ed.2d 612 (1972). In Gates, this Court rejected a rigid two-prong approach which analyzed the past reliability of the informant with the degree of corroboration or verification. Although the rigid approach was rejected, reliability and corroboration would still factor into the totality of the circumstances. Illinois v. Gates, Id, at 230, 103 S.Ct. at 2328. United States v. Brundidge, 170 F.3d 1350, 1352-3

(11th Cir. 1999).

The agents in this case subjectively believed that the informant's plan was unfolding. Their subjective beliefs, however, are entitled to no deference by a reviewing court. Appellate review of a probable cause determination is de novo. Ornelas v. United States, 517 U.S. 690, 116 S.Ct. 1657, 134 L.Ed.2d 911 (1996). Arguably, the agents possessed information that might have justified an investigatory stop, but not a full-blown arrest.

ISSUE II

THAT THE PETITIONER WAS ARRESTED WITHOUT PROBABLE CAUSE, AND THE ITEMS TAKEN FROM HIS PERSON AS WELL AS THE EVIDENCE IN A VAN WERE SUPPRESSIBLE AS THE FRUITS OF THAT ILLEGAL ARREST.

CHAVES was not known to the agents before he got into the informant's van. The agents received no information from the informant during the surveillance that indicated what had transpired inside the shopping mall. CHAVES was observed driving in a casual manner to a warehouse. After ten minutes, CHAVES was observed leaving the warehouse and driving to another location. The agents had no idea where CHAVES was going or what he was transporting. At best, the agents had a suspicion that CHAVES was following the original plan. There were no particularized facts available to the agents indicating that CHAVES was a knowing participant in a plan to transport cocaine.

Faced with this paucity of information, the agents decided to arrest CHAVES. Absent trustworthy information sufficient to warrant a person of reasonable caution in the belief that an offense has been or being committed by a person, probable cause does not exist to arrest. Beck v.

Ohio, 79 U.S. 89, 85 S.Ct. 222, 13 L.Ed.2d 142 (1964). At best, the agents had a reasonable suspicion that CHAVES was involved in illegal activity. Reasonable suspicion is insufficient to justify an arrest. Dunaway v. New York, 442 U.S. 200, 211-12, 99 S.Ct. 2248, 2255-56, 60 L.Ed.2d 824 (1979); Brown v. Illinois, 422 U.S. 590, 95 S.Ct. 2254, 45 L.Ed.2d 416 (1975); Davis v. Mississippi, 394 U.S. 721, 89 S.Ct. 1394, 22 L.Ed.2d 676 (1969).

CONCLUSION

Upon the arguments and authorities aforementioned, the Petitioner would request this Court issue a Writ of Certiorari in this case.

Respectfully submitted,

CHARLES G. WHITE, ESQ.
Counsel of Record
Member of Supreme Court Bar
2250 S.W. Third Avenue
Suite 150
Miami, Florida 33129
Tel: (305) 856-1211
Fax: (305) 856-0171
Florida Bar No. 334170

Counsel for Petitioner

TABLE OF CONTENTS
APPENDIX TO THE PETITION

Opinion,
United States Court of Appeals
For the Eleventh Circuit
entered March 9, 1999 ..... App. 1

Order,
Denying Petition for Rehearing,
United States Court of Appeals
For the Eleventh Circuit
entered June 29, 1999 ..... App. 11

Order,
Denying Petition for Rehearing and
Petition for Rehearing En Banc,
United States Court of Appeals
For the Eleventh Circuit
entered June 29, 1999 ..... App. 12

Affidavit of John Arvanitis
In Support of
Search Warrant Application
dated December 12, 1996 ..... App. 14

UNITED STATES of America, Plaintiff-Appellee,

v.

Frank CHAVES and Rafael Garcia, Defendants-Appellants.

No. 97-5864.

United States Court of Appeals,

Eleventh Circuit.

Entered: March 9, 1999.

Appeals from the United States District Court for the Southern District of Florida. (No. 96-1013-CR-SH), Shelby Highsmith, Judge.

Before HATCHETT, Chief Judge, BARKETT, Circuit Judge, and RONEY, Senior Circuit Judge.

BARKETT, Circuit Judge:

Frank Chaves and Rafael Garcia appeal their convictions for conspiring to possess cocaine with intent to distribute, in violation of 21 U.S.C. " 841(a)(1) and 846, and for possessing cocaine with the intent to distribute in violation of 21 U.S.C. ' 841(a)(1). Garcia also appeals from his conviction for knowingly carrying a firearm in relation to a drug trafficking offense in violation of 18 U.S.C. ' 924(c).

BACKGROUND

On December 12, 1996, agents of the Drug Enforcement Administration ("DEA") received information from a confidential informant relating to drug trafficking in Miami, Florida. Based on the information provided, the DEA developed a plan to seize approximately 240 kilograms of

cocaine using the informant's van. The informant was to provide the keys to the van to a third person, who would then pick up the drugs and return with the van. Although DEA agents surveilled the food court at the shopping mall where the hand-off of the keys was to take place, they did not see the person to whom the informant gave the keys. DEA agents, however, did see Frank Chaves drive off in the informant's van. Using both car and helicopter, the DEA surveilled the van. Chaves, driving the informant's van, stopped at a warehouse in Hialeah Gardens, and departed a short time thereafter. Chaves then drove the van to a Miami Subs restaurant and entered. While Chaves was in the restaurant, a DEA agent approached the van and saw several boxes in an area that was previously empty. DEA agents then proceeded to arrest Chaves and search the van, seizing ten boxes containing 240 kilograms of cocaine, some money, and keys belonging to Chaves.[1]

Shortly after arresting Chaves, DEA agents, who were still surveiling the warehouse, arrested Rafael Garcia and John Torres as they exited the warehouse. Both men were carrying firearms at the time of their arrest. The door of the warehouse was locked and none of the keys taken from Garcia and Torres could open the warehouse. The agents at the warehouse then waited approximately forty-five minutes outside the warehouse with Garcia and Torres in custody. At this time, the agents at the warehouse, who had been joined by those arresting Chaves, conducted a warrantless entry of the warehouse, which was opened by "jimmying" the door using a knife blade. During the sweep of the warehouse, which lasted approximately five to ten minutes, the agents saw boxes similar to those found in the van.

At this point, a search warrant affidavit was drafted, relying on information obtained both before and as a result of the warrantless entry. Late in the evening of December 12, a search warrant was obtained for the warehouse and executed.

[1] These keys, it turned out, were to the warehouse.

As a result of the execution of the warrant, DEA agents found approximately 400 kilograms of cocaine, as well as packaging material, boxes, gloves and items belonging to Chaves.

Chaves, Garcia, and Torres were subsequently indicted. After the district court denied motions by all the defendants to suppress evidence obtained by the DEA agents, Torres pled guilty. Chaves and Garcia went to trial and they were convicted as charged.[2] This appeal followed.

DISCUSSION

On appeal, both Chaves and Garcia argue that the search of the van and the warrantless entry at the warehouse violated their Fourth Amendment rights and, therefore, their motions to suppress the cocaine seized from the van and at the warehouse should have been granted. Chaves claims that the district court erred in ruling that he did not have standing to challenge the entry of the warehouse, while Garcia argues that the district court erred in ruling that he did not have standing to challenge the search of the van. Both defendants also argue that the district court erred in denying their motions to disclose the identity of the confidential informant. Finally, Garcia argues that because the district court took over the suppression hearing from the magistrate judge after the magistrate judge had taken the testimony of one witness, he is entitled to a new suppression hearing.

Initially, we find no abuse of discretion in the trial court's denial of the motion to disclose the confidential informant. Likewise, we find no reversible error in Garcia's claim that the district court should not have completed the suppression hearing after the magistrate judge had already heard from one witness. Although we agree with Garcia that 28 U.S.C. ' 636, which authorizes magistrate judges to hold

[2] The district court granted a motion for judgment of acquittal in favor of Chaves on the charge of carrying a firearm in relation to a drug trafficking offense.

hearings on motions to suppress, does not allow a district court and a magistrate judge to hear a motion to suppress together, cutting off the ability to object to the magistrate judge's credibility findings, we do not find that, under the specific circumstances here, reversal is warranted.

With reference to the Fourth Amendment issues raised, we turn first to the question whether Chaves' and Garcia's respective Fourth Amendment rights were implicated by the searches conducted by the police officers in this case. Although the parties label this inquiry as a question of standing, as did the district court, the Supreme Court recently reminded us that the question " 'is more properly placed within the purview of substantive Fourth Amendment law than within that of standing.' " *Minnesota v. Carter,* --- U.S. ----, 119 S.Ct. 469, 472, --- L.Ed.2d ---- (1998) (quoting *Rakas v. Illinois,* 439 U.S. 128, 140, 99 S.Ct. 421, 58 L.Ed.2d 387 (1978)). As *Carter* teaches, "in order to claim the protection of the Fourth Amendment, a defendant must demonstrate that he personally has an expectation of privacy in the place searched, and that his expectation is reasonable...." *Id.; see also United States v. Cooper,* 133 F.3d 1394, 1398 (11th Cir.1998).

Taking Garcia's claim first, we find no error in the district court's determination that Garcia lacked a reasonable expectation of privacy in the van. Garcia advances no facts to support any claim of an expectation of privacy in the van other than a claim that the contraband in the van belonged to him. This, however, cannot establish that Garcia's Fourth Amendment rights were implicated by the search of the van. Garcia must show that he had a reasonable expectation of privacy in the place searched and he has failed to do so. "A person who is aggrieved by an illegal search and seizure only through the introduction of damaging evidence secured by a search of a third person's premises or property has not had any of his Fourth Amendment rights infringed." *Rakas,* 439 U.S. at 134, 99 S.Ct. 421.

Chaves, on the other hand, did have a reasonable expectation of privacy in the warehouse, and the district court

erred in its finding to the contrary. As the government recognizes, lack of ownership is not dispositive. *See United States v. Garcia,* 741 F.2d 363, 365-66 (11th Cir.1984) ("[L]egal ownership is not a prerequisite for a legitimate expectation of privacy."). As the Supreme Court has recognized, in a variety of contexts, even where a defendant does not own the property searched, he or she may nonetheless have a reasonable expectation of privacy in that place by virtue of his or her relationship with that place. *See Carter,* 119 S.Ct. at 474 (holding that defendants lacked a legitimate expectation of privacy because they did not have a relationship with the home owner, but rather were "simply permitted on the premises"); *id.* at 478-79 (Kennedy, J., concurring) (recognizing that "almost all social guests have a legitimate expectation of privacy, and hence protection against unreasonable searches, in their host's home," but finding no such expectation here because defendants only had a "fleeting and insubstantial connection with Thompson's home"); *Minnesota v. Olson,* 495 U.S. 91, 96-100, 110 S.Ct. 1684, 109 L.Ed.2d 85 (1990) (holding that an overnight guest had a legitimate expectation of privacy in his host's home); *O'Connor v. Ortega,* 480 U.S. 709, 714-19, 107 S.Ct. 1492, 94 L.Ed.2d 714 (1987) (recognizing that, in some circumstances, an employee has a reasonable expectation of privacy in his or her workplace).

Although Chaves did not own or formally rent the warehouse, we believe that his connection to the warehouse was sufficient to establish a reasonable expectation of privacy in the warehouse. *See United States v. Baron-Mantilla,* 743 F.2d 868, 870 (11th Cir.1984) (finding that defendant, who did not own or rent premises searched, "could have established a legitimate expectation of privacy by demonstrating 'an unrestricted right of occupancy or custody and control of the premises as distinguished from occasional presence on the premises as a mere guest or invitee.' ") (quoting *United States v. Bachner,* 706 F.2d 1121, 1126 n. 6 (11th Cir.1983)). The circumstances here lead us to conclude that Chaves was no

"mere guest or invitee," but instead was much closer to that of one who maintained both "custody and control" of the warehouse. Chaves had the only key to the warehouse, giving him a measure of control and ability to exclude others. While possession of a key, without more, might not be sufficient to establish a reasonable expectation of privacy, *see Baron-Mantilla*, 743 F.2d at 870, Chaves seems to have had the only key and, what is more, he also kept personal and business papers at the warehouse. In these circumstances, the Fourth Amendment protects Chaves' privacy interests in the warehouse. *See Rakas*, 439 U.S. at 149, 99 S.Ct. 421 (recognizing that defendant in *Jones v. United States*, 362 U.S. 257, 80 S.Ct. 725, 4 L.Ed.2d 697 (1960) "could legitimately expect privacy" where he obtained a key to friend's apartment, giving him "complete dominion and control over the apartment," and he kept possessions there). The government makes much of the fact that Chaves maintained his principal place of business in another warehouse. Under the Fourth Amendment, however, an individual is not limited to one place of business; the Fourth Amendment protects the reasonable expectation of privacy he or she has in multiple places. *See Olson*, 495 U.S. at 96 n. 5, 110 S.Ct. 1684 (noting that the Fourth Amendment "provides sanctuary for citizens wherever they have a legitimate expectation of privacy").

We recognize that "[p]roperty used for commercial purposes is treated differently for Fourth Amendment purposes than residential property." *Carter*, 119 S.Ct. at 474. The Supreme Court has recognized that an "expectation of privacy in commercial premises ... is different from, and indeed less than, a similar expectation in an individual's home." *New York v. Burger*, 482 U.S. 691, 700, 107 S.Ct. 2636, 96 L.Ed.2d 601 (1987). Certainly, the government's ability to conduct searches of a warehouse is far broader than its ability to search a residence. The fact that Chaves has a lesser expectation of privacy in the warehouse vis-a-vis a residence, however, does not mean that he has no legitimate expectation of privacy in the warehouse. Accordingly, we find, in the particular

circumstances presented here, that the district court erred in concluding that Chaves lacked a reasonable expectation of privacy in the warehouse searched by the police.

We now turn to consider appellants' arguments that the searches in this case violated the Fourth Amendment. Chaves argues that cocaine seized from his van should be suppressed because he was arrested without probable cause, making the search of the van incident to arrest impermissible. In the circumstances of this case, however, we find that the district court did not err in concluding that the police had probable cause to arrest Chaves. As noted above, the confidential informant told the police that the van, which Chaves was driving, was to be loaded with cocaine, the van was observed stopping briefly at a warehouse, and, immediately afterwards, boxes were observed in a previously empty area of the van. These facts, we conclude, were sufficient to establish probable cause to arrest Chaves and search the van and seize its contents incident to that arrest. *See United States v. Diaz-Lizaraza,* 981 F.2d 1216, 1222 (11th Cir.1993). We hold, however, that the initial warrantless entry of the warehouse under the auspices of conducting a "protective sweep" did not comport with the Fourth Amendment. In *Maryland v. Buie,* 494 U.S. 325, 110 S.Ct. 1093, 108 L.Ed.2d 276 (1990), the Supreme Court held that a properly limited protective sweep, conducted incident to an arrest, is permitted under the Fourth Amendment only "when the searching officer possesses a reasonable belief based on specific and articulable facts that the area to be swept harbors an individual posing a danger to those on the arrest scene." *Id.* at 337, 110 S.Ct. 1093. The Court in *Buie* permitted police officers to undertake protective sweeps in these instances because of the compelling "interest of the officers in taking steps to assure themselves that the house in which a suspect is being, or has just been, arrested is not harboring other persons who are dangerous and who could unexpectedly launch an attack," emphasizing that the intrusion was limited to "no more than necessary to protect the officer from harm." *Id.* at

333, 110 S.Ct. 1093.

Here, the government's own action undermines any claim that the entry had a protective purpose. It is undisputed that the sweep in this case did not immediately follow the arrest of Garcia and Torres outside the locked warehouse, but occurred a substantial time after the agents arrested Garcia and Torres. During the interim period, approximately forty-five minutes, the officers simply sat in their cars outside the warehouse. The agents, thus, saw no immediate need to enter the warehouse to protect themselves or other persons in the area. *Buie* requires officers to have "a reasonable basis for believing that their search will reduce the danger of harm to themselves or of violent interference with their mission," *id.* at 337, 110 S.Ct. 1093 (Stevens, J., concurring) and the facts show no such basis here.

Moreover, the government has failed to point to any "specific and articulable" facts that would lead a reasonably prudent officer to believe that, at the time of the sweep, a sweep was necessary for protective purposes. Much of the government's argument why a sweep was needed for protective purposes is not based on any specific facts in the government's possession, but rather is based on the lack of information in the government's possession. The testimony at the suppression hearing indicates that the officers had no information regarding the inside of the warehouse. However, in the absence of specific and articulable facts showing that another individual, who posed a danger to the officers or others, was inside the warehouse, the officers' lack of information cannot justify the warrantless sweep in this case. *See United States v. Colbert*, 76 F.3d 773, 778 (6th Cir.1996) ("Lack of information cannot provide an articulable basis upon which to justify a protective sweep."); *see also Sharrar v. Felsing*, 128 F.3d 810, 825 (3d Cir.1997) ("agree[ing] with ... *Colbert* that '[n]o information cannot be an articulable basis for a sweep that requires information to justify it in the first place' ").

The government also points to the fact that Garcia and

Torres were arrested with weapons in their possession. However, this information "implies nothing regarding the possible presence of anyone being in [the warehouse] "the touchstone of the protective sweep analysis." *Sharrar,* 128 F.3d at 825; *see also Colbert,* 76 F.3d at 777 ("The facts on which officers may justify a *Buie* protective sweep are those facts giving rise to a suspicion of danger from an attack by a third party during the arrest, not the dangerousness of the arrested individual."). Finally, the government notes that one of the agents believed that there was a large shipment of cocaine in the warehouse, making it unlikely that the cocaine would be left unguarded. However, none of the agents were able to see inside the warehouse and none of the agents offered any concrete factual basis for believing that there was either additional cocaine or individuals inside the warehouse. This is exactly the kind of "mere 'inchoate and unparticularized suspicion or hunch' " that *Buie* indicates is insufficient to support a warrantless sweep. *Buie,* 494 U.S, at 332, 110 S.Ct. 1093 (quoting *Terry v. Ohio,* 392 U.S. 1, 27, 88 S.Ct. 1868, 20 L.Ed.2d 889 (1968)).[3]

Having found that the warrantless entry violated the Fourth Amendment, we must consider whether the results of the subsequent search, conducted after the warrant was finally obtained, should have been suppressed. Under this Circuit's precedents, where, as here, the search warrant affidavit is based on information acquired as a result of an illegal entry, we must look to whether the other information provided in the affidavit is sufficient to support a probable cause finding. *United States v. Glinton,* 154 F.3d 1245, 1254-55 (11th Cir.1998). If so, suppression is not required because "the exclusionary rule has no application where the government learned of the evidence from an independent source," *id.* at 1255, provided, of course, that "the agents' decision to seek the

[3] The government also notes that there was a cafeteria and a school in the vicinity of the warehouse. However, the testimony showed that there were no civilians near the warehouse at any time leading up to the warrantless entry.

warrant was [not] prompted by what they had seen during the initial entry...." *Murray v. United States,* 487 U.S. 533, 542, 108 S.Ct. 2529, 101 L.Ed.2d 472 (1988). *Accord United States v. Markling,* 7 F.3d 1309, 1314-18 (7th Cir.1993); *United States v. Restrepo,* 966 F.2d 964, 968-72 (5th Cir.1992); *United States v. Herrold,* 962 F.2d 1131, 1139-44 (3d Cir.1992); *United States v. Gillenwaters,* 890 F.2d 679, 681-82 (4th Cir.1989); *United States v. Salas,* 879 F.2d 530, 536-39 (9th Cir.1989); *United States v. Veillette,* 778 F.2d 899, 903-04 (1st Cir.1985). Even discounting that portion of the affidavit describing information uncovered during the unconstitutional warrantless entry, the balance of the affidavit supports a finding of probable cause. Further, there is nothing in the record to suggest that the police officers sought the warrant because of what they saw during the illegal entry into the warehouse. In light of the information from the confidential informant, the fact that the previously-empty van was seized with cocaine just after a short stop at the warehouse, and the seizure of Garcia and Torres, all of which supported the search warrant, we cannot say that the officers were prompted to seek a warrant based on what they had seen during the unconstitutional warrantless entry. Under *Glinton,* therefore, the district court did not err in admitting as evidence the cocaine and other items seized at the warehouse.

Accordingly, the judgment of the district court is AFFIRMED.

IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH DISTRICT

No. 97-5864

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

versus

FRANK CHAVES, RAFAEL GARCIA,

Defendants-Appellants.

On Appeal from the United States District Court for the Southern District of Florida

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Entered: June 29, 1999

BEFORE: HATCHETT and BARKETT, Circuit Judges, and RONEY, Senior Circuit Judge.*

PER CURIAM:

The petition(s) for rehearing filed by Appellants, Rafael Garcia and Frank Chaves, are DENIED.

ENTERED FOR THE COURT:

/S/ Rosemary Barkett
UNITED STATES CIRCUIT JUDGE

*This decision is rendered by a quorum, due to the retirement of then-Chief Judge Hatchett on May 14, 1999. 28 U.S.C. §46(d).

IN THE UNITED STATES COURT OF APPEAL
FOR THE ELEVENTH CIRCUIT

No. 97-5864

UNITED STATES OF AMERICA,
Plaintiff-Appellee,

versus

FRANK CHAVES, RAFAEL GARCIA,
Defendants-Appellants.

On Appeal from the United States District Court for the Southern District of Florida

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Entered: June 29, 1999

ON PETITION(S) FOR REHEARING AND PETITION(S) FOR REHEARING EN BANC (Opinion _____, 11th Cir., 19__, ___F2d ____).

BEFORE: HATCHETT and BARKETT, Circuit Judges, and RONEY, Senior Circuit Judge.*

PER CURIAM:

The Petition(s) for Rehearing are DENIED and no member of this panel nor other Judge in regular active service on the Court having requested that the Court be polled on rehearing en banc (Rule 35, Federal Rules of Appellate Procedure; Eleventh Circuit Rule 35-5), the Petition(s) for Rehearing En Banc are DENIED.

ENTERED FOR THE COURT:

/S/ Rosemary Barkett
UNITED STATES CIRCUIT JUDGE

*This decision is rendered by a quorum, due to the retirement of then-Chief Judge Hatchett on May 14, 1999. 28 U.S.C. §46(d).

ORD-42
(6/95)

AFFIDAVIT

I, John Arvanitis, (hereafter your affiant) being duly sworn, do hereby depose and state the following:

1. The affiant is employed by the United States Department of Justice, Drug Enforcement Administration (DEA) as a special agent and has been so employed for the past 9 years.

2. The affiant has worked with the confidential informant (CI) in this case for the past year, and has found the CI to be accurate and reliable. Specifically, the CI has provided the affiant with information which has resulted in seizures of large quantities of cocaine and U.S. currency.

3. On December 12, 1996, the CI received a cellular telephone number to contact an unknown person so that the CI could take receipt of a large quantity of cocaine.

4. A meeting was arranged so that a vehicle could be provided to the unknown individual in which to load the cocaine.

5. At approximately 4:10 p.m. on December 12, 1996, federal agents observed an individual later identified as Frank Chavez enter the vehicle that was provided to him in order to facilitate the delivery of the cocaine.

6. A surveillance of Frank Chavez revealed that he entered the vehicle provided to him and drove to a warehouse located at 13199 Northwest 107 Avenue #2A, Hialeah Gardens, Florida.

7. At approximately 4:45 p.m. on December 12, 1996, federal agents observed Frank Chavez exit the warehouse previously described.

8. Agents observed Frank Chavez drive the vehicle from the warehouse to the parking lot of the Miami Subs restaurant located at 103rd Street and 16th Avenue in Hialeah, Florida.

9. As Frank Chavez exited the vehicle he was detained by federal agents, while other agents entered the vehicle and observed several cardboard boxes therein.

10. An inspection of one of the cardboard boxes revealed that it contained several bricks of a white powdery substance. A field test of one of the bricks tested positive for the presence of cocaine. It is estimated that there are approximately 240 kilograms of cocaine in the vehicle.

11. At approximately 5:30 p.m. two individuals identified as John Torres and Rafael Garcia were observed leaving the warehouse. They were detained and searched and each one was found to be in possession of a firearm.

12. The agents conducted a safety sweep of the warehouse and observed other cardboard boxes inside the warehouse similar to those found in the vehicle driven by Frank Chavez.

Wherefore, the affiant respectfully requests that this Court issue a search warrant authorizing a search of the premises located at 13199 Northwest 107 Avenue #2A Hialeah Gardens, Florida for evidence of narcotics dealing as well as conspiracy in violation of Title 21, United States Code, Sections 841(a)(1) and 846.

Further affiant sayeth naught.

/S/John Arvanitis
John Arvanitis, Special Agent

Sworn and subscribed to
before me this 12th day of
December 1996.

/S/ Judge
United States Magistrate Judge